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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re L.L.V., et al., Persons Coming Under
the Juvenile Court Law.

B203888
(Los Angeles County
Super. Ct. No. BK05954)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

RHONDA V.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Albert J. Garcia, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo for Plaintiff and Respondent.

I. INTRODUCTION

Rhonda V., is the mother of Sabrina H., Anthony H., Faith H., Hope A., and L. L. V. The mother appeals from an order terminating parental rights as to L. L. pursuant to Welfare and Institutions Code¹ section 366.26. The mother also appeals from an order denying a section 388 modification petition as to all the children. The mother contends the order terminating parental rights must be reversed because: the juvenile court violated the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963) by prematurely ruling it was inapplicable to this case; the juvenile court erred in failing to find that the sibling exception to termination of parental rights applied; and the juvenile court erred in failing to grant the mother's section 388 petition as to some or all of the children. We affirm the juvenile court orders terminating parental rights and denying the section 388 petition.

II. BACKGROUND

On April 7, 2006 the Los Angeles County Department of Children and Family Services (the department) filed a section 300 petition on behalf of L. L. (who was born in November 2004) and four of her older siblings. The four siblings were Sabrina (who was born in October 1993), Anthony (who was born in August 1995), Faith (who was born in February 2001), and Hope (who was born in January 2003). As sustained, the petition alleged that the mother had endangered the children by having a filthy, unsanitary, and unsafe home environment which included: feces and urine throughout the home, on the children's clothing, in their room, on the floor, on the walls and in the toilet; spoiled food in the refrigerator and on the living room floor; dirty dishes on the living room table;

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

dirty clothes piled three feet high in the children's room and in the hallway; trash in bags and strewn about the living room and kitchen; and the emission of a foul odor. The petition further alleged: the mother was arrested on April 4, 2006 for child endangerment; the mother had a 10-year history of substance abuse; the mother on numerous occasions left the children at home including overnight without supervision; due to the mother's substance abuse, 4 older children were prior dependents of the juvenile court; due to substance abuse, the mother failed to reunify with 2 other children, Richard H. and Serina H., both of whom received permanent placement services; and the mother failed to ensure that Sabrina and Anthony attended school regularly.

The detention report stated a maternal aunt said that the maternal great grandmother, Sanya V., belonged to the Cherokee Tribe. On April 4, 2006, Case Social Worker Mark Cheung responded to an emergency child abuse and neglect referral that the children were victims of neglect by the mother. The mother was arrested for child endangerment. Two Long Beach police officers found the children in filthy conditions including the aforementioned feces on the floor, clothes, walls, and furniture. There were also two nonworking toilets backed up with feces. The mother told police officers she had notified the apartment management about the toilets and was told she had to fill out a request. However, when the police summoned a maintenance employee, Carlos Ramirez, to clear the toilets, he stated that the mother had not said anything to him or the management about the toilets. Mr. Ramirez was able to clear the toilets. However, he had to rush from the apartment gasping for fresh air because of the foul odor. Mr. Ramirez eventually began heaving and dropped to his hands and knees while throwing up into a storm drain. The mother's explanation as to the condition of the apartment was that Anthony and the three younger children "don't clean up" after themselves.

Although the refrigerator had a gallon of milk, the rest of the food was rotten and inedible. There were old chunks of meat in a high chair in the kitchen and on the floor and living room. There was some bologna on a kitchen counter that had started to change color. Dirty dishes were on the living room table with days old food.

The police report states that the mother was asked to put warm clothes on the children and she responded she did not have any. Although it had been raining all day and was cold outside: the mother dressed the children in short sleeve shirts; one child had on a summer dress; and two of the children did not have shoes. The children had no jackets and their clothes were dirty.

According to Sabrina, the mother would leave the apartment at night. When that occurred, Sabrina stated that she cared for her younger siblings. Sabrina also kept a journal which described the mother's overnight absences. The journal described Sabrina's care for the younger children and her frustrated efforts to attend school. According to the journal, on March 27, 2006, Sabrina was told she could not go to school. This was because the mother had no gas for the car. When Anthony woke up about 10 a.m., Sabrina told the mother he had been continuously crying because his foot was hurting. The mother was eventually able to get the car started and left with Anthony. Sabrina took care of the other younger siblings until the mother returned at about 8 p.m. On March 28, 2006, the mother was not at home when Sabrina awoke. Sabrina went back to sleep because she had no one to take her to school. Sabrina indicated that she spent the day taking care of her younger siblings. The mother returned home at about 8 p.m. The journal documented that Sabrina did not attend school from March 29 through March 31, 2006.

The principal of Sabrina and Anthony's school spoke to the police. The principal explained that Sabrina had 16 unexcused absences and Anthony had 20 unexcused absences since February 2006. The principal stated that, about two weeks prior to the referral, Anthony had gone to school using crutches. Anthony said he needed the crutches because he had broken his foot. The school nurse told the mother that Anthony could not return to school without a doctor's note justifying the need for the crutches. The mother had a history of department referrals between August 15, 1995, and January 25, 2006. Eight dependency petitions had been filed concerning the mother's children

including her five older children some of whom had received permanent placement services.

The children were ordered detained on April 7, 2006. The juvenile court noted the mother was incarcerated and ordered she be brought to court for arraignment. The juvenile court deferred ruling on reunification services issues but ordered the department to follow-up on Anthony's leg injury as well as weekly sibling visits. At the April 11, 2006 arraignment, the mother told the juvenile court that she was of Cherokee Indian heritage. The department was ordered to comply with the Indian Child Welfare Act and to give notice to the Cherokee tribes. The juvenile court ordered family reunification services. The mother indicated that she did not know the whereabouts of either alleged father, Richard H. or Jovannie A., neither of whom is a party to this appeal.

For a May 3, 2006 jurisdiction hearing, the department reported that Sabrina, Anthony, and L. L. had been placed in three separate foster homes. Faith and Hope had been placed together in a fourth foster home. The department reported that Hope had been born with a positive toxicology test for amphetamines in January 2003. The mother had a 10 year history of substance abuse and was a frequent user of amphetamines, opiates, and benzodiazepines. The mother's older children, Misty H., Eleana H., Joshua H., Richard H., and Serina H., had been declared dependents of court under section 300, subdivisions (b), (c), and (g). Sabrina, Anthony, Faith, and Hope had been subject of prior dependency cases. Jurisdiction was terminated for Sabrina and Anthony in December 1998 in one case. In February 2003, Sabrina, Anthony, Faith, and Hope were declared dependents of the court under section 300 subdivisions (b) and (j) based in part on the mother's substance abuse. Jurisdiction of this latter matter was terminated on July 28, 2005.

On April 4, 2006, the children were detained by the department. On that date, the mother told Sabrina to urinate into a cup. The police officers, who had arrived at the apartment, had given the mother a cup for a urine test designed to detect the presence of narcotics. Sabrina responded that she did not want to urinate in the cup. However, the

mother became angry with Sabrina. The mother stated that she had taken medication and it would seem as though she had taken drugs. Sabrina stated the mother had been abusing drugs. Sabrina reported seeing pipes and smelling the odor of drugs. On occasion, the mother would go into her room and shut the door. On these occasions, Sabrina smelled the odor of drugs.

The mother initially stated that she had last used methamphetamines on March 7, 2006. Later the mother changed the date she claimed she last used narcotics and stated that it had been March 7, 2003. The mother stated that she had not used any drugs since completing a drug rehabilitation program in 2003. The mother denied leaving the children alone overnight. The mother acknowledged leaving the girls with Sabrina for one or two hours in order to go to the store.

Attached to the May 3, 2006 report was a juvenile court document dated January 8, 2003, wherein the mother and Jovannie A. claimed no American Indian heritage. The department also submitted copies of notices dated April 18, 2006 which had been sent to the: Cherokee Nation of Oklahoma; United Keetoowah Band of Cherokee Indians; Eastern Band of Cherokee Indians; Bureau of Indian Affairs; and Secretary of the Interior. The department also attached certified receipts and signed domestic return receipts showing that the JV-135 notices were served on: the Cherokee Nation of Oklahoma on April 21, 2006; Bureau of Indian Affairs in April 2006; and United Keetoowah Band of Indians on April 21, 2006. The May 3, 2006 hearing was continued to May 17, 2006, for the department to demonstrate that due diligence had been exercised in an effort to locate Jovannie. The mother was ordered to return for her contested jurisdictional hearing.

On May 17, 2006, the department filed an interim review report which showed that on May 4, 2006 notices were sent to the: Bureau of Indian Affairs; Cherokee Nation; Eastern Band of Cherokee Indians; and the United Keetoowah Band of Cherokee Indians. Certified mail receipts were attached for the: Cherokee Nation dated May 8, 2006; Eastern Band of Cherokee Indians dated April 25, 2006 and May 9, 2006; United

Keetoowah Band of Cherokee Indians dated May 10, 2006; and Bureau of Indian Affairs with no specific date.

When the mother failed to appear at the May 17, 2006 hearing, the juvenile court conducted the adjudication hearing in her absence. The mother appeared after counsel argued and the juvenile court had sustained the allegations of the petition. However, the juvenile court reopened the hearing to allow the mother to testify. She testified that her home was “dirty” but not “filthy” because “they caught [her] at a wrong time.” She denied currently abusing narcotics and stated the last time she had used illicit drugs was on March 7, 2003. The mother denied that there were narcotics or drug paraphernalia in her home. The mother admitted leaving the children with 13-year-old Sabrina for 2 or 3 hours. But the mother denied she left the children alone overnight. Sabrina and Anthony missed school because of his foot injury.

After the mother testified, the juvenile court once again sustained the petition under section 300, subdivisions (b), (c), and (j) as to her. The juvenile court found that a substantial danger existed to the physical and emotional health of the children and no reasonable means existed to protect them without removal from the mother’s home. The mother was ordered to: undergo psychiatric and psychological Evidence Code section 730 evaluations and to follow the recommendations; complete a drug rehabilitation program with random testing; upon completion of the narcotics rehabilitation program, enroll in an aftercare program to test weekly for drugs; and participate in individual counseling about a dirty home, child endangerment, and insuring the children attended school. The juvenile court denied reunification services to the alleged fathers. The mother was granted reunification services. The mother was granted monitored visitation a minimum of three times a week for three hours each visit. The juvenile court found that the department had complied with the Indian Child Welfare Act and it did not apply to this case. The juvenile court set a six-month review hearing for November 15, 2006.

On June 23, 2006, two Evidence Code section 730 evaluators advised the juvenile court that the mother had failed to appear for scheduled appointments. On June 28, 2006,

the juvenile court spoke to the mother's attorney. Once again the mother was ordered to comply with the court-ordered Evidence Code section 730 evaluation process.

A November 15, 2006 status review report stated that Sabrina and Anthony were in licensed foster homes. Faith and L. L. were living in separate homes. Hope was living with a maternal aunt. The children had sibling visits at least two times per month. The aunt and the foster parents arranged the visits. The siblings had holiday visits with the aunt.

Hope showed signs of aggression since visiting with the mother. Likewise, L. L.'s foster parents stated the youngsters became aggressive after visiting the mother. They noted that L.L was aggressive at the time of placement. But the aggressive behavior stopped until the visits with the mother resumed. The foster parents stated that L. L. would state "no" and strike them. Also, L. L. would come home and disrobe herself. The department reported that L. L. appeared to be adjusting to her placement but was shy.

Also in the November 15, 2006 status review report, the department reported that the mother had been convicted of willful cruelty to a child on April 6, 2006. The mother was provided with reunification services referrals on April 13, 2006, but refused to accept the packet. The mother stated she would not cooperate with juvenile court orders: for individual, parenting, and drug counseling; random drug testing; and Evidence Code section 730 evaluations. The mother stated that she was attending a parenting class so that would not have to go to jail. On October 4, 2006, the mother stated, "I am not guilty and that it was only a dirty house." The mother further stated: "You guys are fucking with me. I am not going to cooperate with you or 'Mr. Garcia.'" By "Mr. Garcia," the mother was apparently referring to the commissioner assigned to this case. During the dependency hearings, the mother continuously interrupted Commissioner Garcia as well as referred to him as "Garcia."

The mother made limited efforts to visit the children. The mother had only 1 visit with the children, which lasted about 15 minutes because she was tardy. The mother was

then not reachable by telephone or letter. The mother made an unannounced visit to the home of an adult daughter Misty where Sabrina and Anthony were visiting. The mother was argumentative and accused the family of not inviting her to gatherings at the aunt's home. Misty called the police to remove the mother from the home. Only then would the mother leave. In August 2006, the maternal aunt was going to monitor a visit with the mother, Hope, and L. L. However, the mother canceled the visit with Hope and L. L. The mother subsequently called the department and complained about her family. The department employees explained that visits had to be arranged through the case social worker and that the mother's telephone number was not working. The mother provided the department with a post office box and an updated cellular telephone number. The mother would not provide information about her employment but stated she could only visit the children on Thursdays because of her unspecified job. The mother appeared for a visit on October 12, 2006, which Sabrina chose not to attend. The mother arrived one hour later for a visit on October 19, 2006. The foster parents reported that the children had acted aggressively after the previous visit.

A visit was scheduled for October 26, 2006. The mother had been notified in writing of the scheduled visit. The case social worker called the mother on October 26, 2006. Faith and Hope had to be driven to the department office. The mother telephoned and said she would not be present. On November 2, 2006, the mother telephoned a day prior to the visit to confirm she would be present. Although Faith and Hope were removed from school early, the mother did not appear for the scheduled visit. The mother telephoned at 4:35 p.m. and left a message regarding scheduling a visit with Anthony. But the mother said nothing about the missed visit with Faith and Hope. Although the mother's behavior was appropriate during the visits at which she was present, the children regressed after visiting with her. Faith did well in her foster home until visiting with the mother. Faith was placed with in non-related family members' home. The foster father stated that Faith would become more aggressive and defiant after visiting the mother. At school, Faith hit the other children leaving marks on them. When

the mother missed two visits, Faith's behavior improved and the school did not send notes home to the foster parents.

Hope was placed with a maternal aunt, Theresa. L. L. was placed with non-related family members where she had been since May 31, 2006. An adoption study was activated. When L. L. was initially placed, she was aggressive and would throw things at others. L. L. also did not like to wear shoes or clothes and would take them off. However, when L.L. became adjusted to her foster parents, the aggression decreased and she kept her clothes on. When the mother began visiting, L. L. became aggressive and disrobed. As the foster father would drive up to the department office where the visit was to occur, L. L. would start kicking. Sabrina and Anthony had been moved to new foster homes several times. Only one of the new placements was due to behavior when Anthony was defiant. The mother had not complied with court orders and had stated that she did not intend to cooperate with the reunification plan. The department recommended that the juvenile court terminate the mother's reunification services and set a section 366.26 hearing.

On January 25, 2007, the department reported that the mother had stated she was residing in a sober living residence. However, the mother had not provided the department with an address. On January 9, 2007, after the mother indicated she wanted to start narcotics testing, the department enrolled her in a random drug-testing program on January 9, 2007. The mother failed to appear for testing on January 18, 2007. The mother stated she was enrolled in "Women to Women" substance abuse program. But a program representative indicated in fact that the mother was in fact not enrolled. The mother had visited Faith three times and L. L. once. The visits were appropriate. The foster parents for Sabrina, Anthony, and Hope stated that the mother had not called to arrange visits. Sabrina had been moved from her foster home. Sabrina had been placed on an emergency basis with her older sister Misty. A department social worker stated Misty was interested in a permanent plan of legal guardianship for Sabrina and Anthony. However, more suitable housing would be required. Also Misty was reluctant to move

her own family unless parental rights were terminated in this case. Sabrina and Anthony had had multiple placements due to unforeseen problems with several of the foster homes.

The children visited on December 24, 2006, for Christmas and in early January 2007 for Hope's birthday. An adoption home study had been approved for Hope on October 30, 2006, and one for L. L. on November 19, 2006. Faith's foster parents were interested in adopting her. The visits with the mother caused Faith to be stressed. When the mother left, Faith would cry and walk back and forth stating, "What am I going to do with my mother." Faith was worried about the mother having to walk and having a place to live.

The department recommended that the juvenile court terminate the reunification services and set a section 366.26 hearing. The department also recommended that visitation with the mother be decreased as to Faith, Hope, and L. L. due to the detriment that it had on the children as they continued to adapt to their prospective adoptive homes. The juvenile court continued the January 25, 2007 hearing to March 5, 2007, because the adoption assessments had not been received.

On March 5, 2007, the department reported that Faith had been referred to the Regional Center while in the mother's care. The case was closed when the mother failed to appear for appointments. Faith was eligible for services due to a mild retardation, delays in speech, and difficulty retaining learned information. She was receiving counseling services. Faith's therapist stated that the youngster displayed signs of Fetal Alcohol Syndrome. Faith had behavioral issues at school. The mother had consistently visited Faith but had been late on three occasions. Faith asked why she had to go to the visits. Since the visits with the mother had been more consistent: Faith's behavior, especially at school, had begun to decline; Faith was destroying school property by writing on walls and library books; and Faith would steal food from the other children at school. In her first placement, Faith would hide food in her room.

The March 5, 2007 report indicated the mother had visited L. L. only three times since January 2007. The mother did not return telephone calls from L. L.'s foster parents when they tried to arrange more consistent visits. L. L. did not act out after visiting the mother. The mother canceled three visits with Sabrina and Anthony. The mother made no attempt to visit Hope. The mother had been given a letter providing her with telephone numbers so she could contact the foster parents to arrange visits. The mother stated she had not read the letter. The mother had not complied with court orders including completing the Evidence Code section 730 evaluations. The mother tested positive for opiates, codeine, and morphine on February 14, 2007. On February 26, 2007, the mother tested positive for opiates, codeine, morphine, and hydrocodone. The mother had not enrolled in a drug program. The children had sibling visits. The department recommended that the mother's visits with Faith be suspended and that the visitation with the other four children be reduced from three times per week.

On March 5, 2007, the juvenile court set the matter for a contested section 366.2 hearing on April 4, 2007. On April 4, 2007, the department reported that the mother had been arrested for driving with a suspended license and on a bench warrant. The bench warrant was issued after the mother failed to appear to show progress on a 52-week parenting class. The parenting class was one of her probation conditions imposed after the children were taken from her and she was convicted of child cruelty. Case Social Worker Louella Garcia spoke with a representative for the mother's drug program on March 19, 2007. Kiely Gilmore told Ms. Garcia that the mother was inconsistent in program attendance and had tested positive for codeine and vicodin. The mother did not provide a prescription for those drugs from a doctor. On April 4, 2007, Ms. Garcia spoke with Dawn Alfonso at the mother's drug counseling program. Ms. Alfonso stated that the mother remained inconsistent in program attendance. Also, the mother continued to test positive for codeine and most recently for methadone.

On April 4, 2007, the juvenile court found that reasonable reunification efforts had been made by the department. Further, the juvenile court found the mother was not in

compliance with the case plan. Family reunification services were terminated and the matter was set for a permanent plan hearing.

On August 1, 2007, the department reported that Sabrina had been removed from Misty's home. Sabrina stated that her brother-in-law had sexually molested her. As a result of the incident, Anthony could not live in the home. Anthony had been in his current foster home for about a year. However, the family was unwilling to commit to a permanent plan. Anthony wanted to be with either of his natural parents. Faith's foster family wanted to adopt her but the foster mother was diagnosed with cancer. The family was unable to deal with Faith's special needs such as not understanding misbehavior had negative consequences. Faith wet her bed at night and would defecate in her pants on occasion. Faith's misbehaviors evidenced themselves more often when the mother was visiting. One of the alleged fathers, Richard H., had been located in Seattle, Washington. The department suggested him as a possible placement for Anthony and Sabrina.

In a separate section 366.26 report for L. L. dated August 1, 2007, the department related there was a very good likelihood that she would be adopted by her caretakers, with whom she had been placed on May 31, 2006. L. L. had sibling visits at least one time per month. For the previous two months, the visits did not occur due to the changing placement of her siblings. L. L.'s caretakers wanted to adopt her to provide her with a more stable and permanent home. L. L. had a close attachment to the foster parents. The foster parent's adoption home study had been approved. L. L. was thriving in her foster home which was neat, clean and contained sufficient food. The August 1, 2007 report stated that the mother had not visited L. L. since April 2007.

On August 1, 2007, Hope's maternal aunt Theresa, asked that the child be removed from the home. The maternal aunt was unable to deal with some inappropriate sexual conduct by Hope. L. L.'s foster parents stated that they are willing to adopt Hope.

At the August 1, 2007 hearing, the juvenile court ordered Hope referred to individual counseling. The department was also ordered to ensure that the children had sibling visits twice a month. The juvenile court found that it was not likely Sabrina,

Anthony, or Faith would be adopted and ordered the department to initiate long-term foster care for them. The juvenile court continued the hearing to assess the permanent plan of adoption or legal guardianship for Hope until November 28, 2007. The matter was continued to September 20, 2007, for a contest by the mother as to L. L.

On September 20, 2007, the department reported that the mother had enrolled in Baby Step Inn substance abuse residential treatment. Since the mother enrolled in treatment, she had again initiated visits with the children. After the mother began visiting, Hope began to engage in the sexual conduct again. A department report prepared by Ms. Garcia states: “[The foster parents] state that Hope has restless sleep the day before the visit and a few days after the visits. [A foster parent] states that Hope asked if she had to go back and visit with [the] mother.” The mother gave the children sweets, chips, and soda at each visit. The mother said she had the right to give the children what she wanted. The siblings had one visit in August 2007 for Anthony’s birthday. On September 6, 2007, Sabrina was placed in a new prior foster home that was near the home of L. L. and Hope.

In a status review report on October 3, 2007, the department reported that Hope and L. L. were adjusting well to their placement. Faith was in counseling because she appeared to show no remorse for her actions. For example, Faith was abusive to animals. The mother was inconsistent in keeping appointments and calling to confirm her visits. The children had a sibling visit and one with the mother on September 20, 2007. The mother acted appropriately and spoke in positive terms regarding the children. The children had positively interacted and hugged each other as the visit ended.

The mother had enrolled in a Baby Steps Inn treatment program on July 31, 2007. The mother’s progress report stated she had made a “healthy” transition into the program and appeared to be in a good mood most of the time. The mother tested negative weekly at the program. The mother was seeing a psychiatrist and receiving psychotropic medication. The mother stated she noticed a difference in her thought process. Ms. Garcia noted that the mother no longer called leaving derogatory messages. The mother

also allowed the other person to speak and to provide necessary information. Richard H. had written Sabrina a letter but did not contact her after she wrote back to him. Sabrina was returned to a foster home that she had been in for over two years. Sabrina had lived in this foster home prior to being reunified with the mother. Sabrina did not wish to go back to live with the mother. But Sabrina wanted to continue to visit the mother. Due to Faith's behavioral issues no potential adoptive home has been located. Faith and Sabrina were allowed to have overnight visits. The overnight visits were in Faith's foster home. Anthony's foster parents did not want legal guardianship because they would lose foster agency pay rates. Hope's placement in the same foster home as L. L. was going well. The foster parents wanted to adopt both Hope and L. L.

As for Sabrina, Anthony, and Faith, the department reported it could not recommend reunification with the parents because: Sabrina did not wish to reunite with the mother; the mother had not completed her substance abuse treatment; and Richard H. had not provided information about his ability to care for the children. The department could not recommend adoption because: Sabrina and Faith had been recently placed in new foster homes; Faith's behavior was in need of stabilization; and Anthony did not wish to be adopted. The department could not identify legal guardianship because no one was interested in becoming their legal guardian. The department recommended that Sabrina, Anthony, and Faith remain placed in planned permanent living arrangements. The department recommended adoption for Hope and L. L. At the hearing on October 3, 2007, the children stated they "barely" saw each other. The juvenile court ordered the department to ensure the siblings had visits of a minimum of two times per month.

On October 31, 2007, the mother filed a section 388 petition requesting return of all the children to her care and custody. In the alternative, the mother requested that family reunification services be reinstated and unmonitored visits be provided. The petition alleged that the mother was sober, had completed parenting classes, and had participated in all programs. The children had been placed in different foster homes with little stability. The petition alleged that the change was in the children's best interests

because: they were not placed together; the children were bonded; the children visited one another; the children were bonded with the mother; the mother was complying with court orders and could reunite them; and the mother feared that they would not be allowed to continue to see each other.

Attached to the mother's section 388 petition was a letter from the Las Casita Residential Treatment Program. The letter, which was dated October 30, 2007, stated that the mother had entered the program on October 12, 2007, when Baby Steps Inn closed. The La Casita program was six months long for women and children. The program consisted of: individual counseling; individual therapy; group counseling; case management; parenting classes; random drug testing; community based 12-step meetings; domestic violence classes; relapse prevention; grief and loss; and self esteem classes; co-dependency groups; and vocational educational classes. The juvenile court set a hearing on the section 388 petition for November 14, 2007.

In an interim review report for November 14, 2007, the department reported that the social worker continued to work at arranging visits with the children and the mother. Sabrina's foster parent drove the youngster twice to visit the mother. The foster parent wanted to schedule the visits the same time that Hope and L. L. visited the mother. However, Sabrina wanted time alone with the mother. The mother visited with Anthony on Saturdays but was required to call a day in advance to confirm the visits. The mother had been inconsistent in arranging the visits with Anthony. The mother said she has a difficult time arranging for visits with Anthony. The mother said the same was true in terms of visits with Faith.

On November 14, 2007, the juvenile court heard the section 388 petition which the mother placed into evidence. After counsel argued, the juvenile court denied the mother's modification petition. The juvenile court found the mother had failed to show by a preponderance of the evidence that there had been a change of circumstances or that it would be in the children's best interests to have the petition granted.

The juvenile court then proceeded to the contested section 366.26 hearing as to L. L. The parties stipulated that, if called to testify, Anthony would oppose L. L.'s adoption. The juvenile court received into evidence the department's reports dated August 1, September 20, October 3, and November 14, 2007. The mother's attorney, Barbara Cohen, argued that an exception to termination of parental rights based on the sibling relationships. Ms. Cohen argued that L. L. should not be adopted because: Hope was not in a stable placement; Hope's placement changed August 7, 2007; Sabrina had only been placed with her current foster parents since July 2007; there was no indication that the foster parents wanted to adopt Sabrina; Anthony's foster parents did not want to adopt him; and Faith was a special needs child who was not in a stable placement. According to Ms. Cohen, the juvenile court would be sending the wrong message by terminating the parental rights of one child and conducting a legal guardianship as to the other children. Ms. Cohen then argued that legal guardianship was in L. L.'s best interests because: the children were all raised in the same home before being taken away from the mother; the children visit together; and ongoing contact is in the children's best interests.

Loraine Tafoya, who represented Sabrina, Anthony, and Faith, joined in Ms. Cohen's analysis. Ms. Tafoya argued her clients should continue their contact with L. L. Susan Crane, who represented Hope and L. L., did not object to a guardianship because it would preserve the sibling relationship. However, Ms. Crane pointed out that L. L.'s caretakers preferred and were willing to adopt the youngsters, who had been living in their home for 18 months. Ms. Crane further noted that Hope was also living in the home with L. L. and that the foster parents wanted to adopt Hope as well.

Ligia Schaffer, who represented the department, argued that the sibling relationship exception did not did not preclude termination of parental rights. The department's position was that: L. L. was 17 months old when she was detained; L.L. had spent a longer time living in foster care than residing with the mother and the

siblings; Hope was now living in the same home with L. L., and the foster parents wanted to adopt Hope.

The juvenile court found it likely that L. L. would be adopted and that no exception existed. The juvenile court then terminated parental rights as to L. L. The mother filed this timely appeal.

III. DISCUSSION

A. The Indian Child Welfare Act

The mother contends that the order terminating parental rights must be reversed based on non-compliance with the notice requirements of the Indian Child Welfare Act. Title 25 United States Code section 1912(a) states, “[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” When the tribe cannot be determined, the notice must be given to the Bureau of Indian Affairs. (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th. 247, 258.)

The mother argues that the juvenile court order finding by clear and convincing evidence on May 17, 2006 that the department had complied with the Indian Child Welfare Act cannot be upheld because it was prematurely entered. The mother’s argument is predicated on the following theories: the juvenile court cannot make a foster care placement or terminate parental rights until 10 days after the notice has been mailed (25 U.S. C. § 1912(a); § 224.2, subds. (a), (b) & (d)); notices attached to the report dated May 17, 2006 showed that 10 days had not elapsed since receipt of the notices by the tribes between May 8 and 10, 2006; the juvenile court must wait 60 days before

determining the Indian Child Welfare Act does not apply (§ 224.3 subd. (e)(3)); and 60 days had not elapsed since the notice was sent to the tribes on May 4, 2006. The department counters the notices attached for the May 3, 2006 hearing show the department mailed them: on April 18, 2006 to the Cherokee Nation of Oklahoma; on April 18, 2006, to the United Keetoowah Band of Cherokee Indians; and on April 25, 2006, to the Eastern Band of Cherokee Indians. According to the department, all the tribes received more than 10 days notice prior to the May 17, 2006 ruling that the Indian Child Welfare Act did not apply. With regard to any 60-day requirement the department argues: the mother forfeited the right to raise the issue of the juvenile court's failure to comply with former rule 1439(f)(6) of the California Rules of Court,² which was in effect in May 2006 when the juvenile court made its ruling; any failure to comply with former rule 1439(f)(6) was harmless error; we have judicially noticed juvenile court records entered on March 11, 2008 which demonstrates the proper notices were served on the appropriate parties and that the Indian Child Welfare Act did not apply.

We disagree with the department that the mother's failure to raise the notice claim in the juvenile court resulted in a forfeiture of the right to assert the lack of compliance on appeal. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706.) However, we agree with the department that the tribes and the Bureau of Indian Affairs were served with notices in April 2006 well over 10 days prior to the May 17, 2006 hearing. With respect to the 60-day requirement, we conclude the

² All further references to rules are to the California Rules of Court. At the time the juvenile court made the determination that the Indian Child Welfare Act did not apply, former rule 1439(f)(6) provided, "If, after a reasonable time following the sending of notice under this rule—but in no event less than 60 days—no determinative response to the notice is received, the court may determine that the act does not apply to the case unless further evidence of the applicability of the act is later received." Effective January 1, 2007, former rule 1439 was renumbered as 5.664. Rule 5.664 was repealed effective January 1, 2008. The 60-day requirement is now embodied in section 224.3.

juvenile court records we have judicially noticed (Evid. Code §§452, subd. (d), 459, subd. (a)) show that more than 60 days have passed since the Indian tribes and the Bureau of Indian Affairs were served with notice of dependency proceedings. No claim is made that the notices were deficient or that the department's service was otherwise noncompliant with the Indian Child Welfare Act. Rather, the sole contention is that the juvenile court failed to wait 60 days before determining the Indian Child Welfare Act was inapplicable. The records we have judicially noticed show no tribe nor the Bureau of Indian Affairs has indicated that L.L. is Indian. Therefore, any issue concerning failure to comply with the 60-day requirement is moot. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1417; *In re Cassandra B.* (2004) 125 Cal.App.4th 199, 210.) The mother has, therefore, not established that the failure to wait 60 days requires that the order terminating parental rights as to L. L. be reversed. We need not address the department's remaining contentions.

B. The Section 388 Petition

The mother asserts the juvenile court erred in failing to grant her section 388 modification petition as to some or all of the children. The mother claims the juvenile court abused its discretion by denying the modification petition without making reference to the evidence or arguments nor articulating the basis of the ruling. Section 388 provides in part: “(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall

set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. . . . [¶] (c) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes.” Our Supreme Court stated the applicable standards in a section 388 petition as follows: “The petition for modification must contain a ‘concise statement of any change of circumstance or new evidence that requires changing the [previous order.]’ [Citation.] The petition must be liberally construed in favor of its sufficiency. [Citations.] . . . ‘[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.’ [Citation.]” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see *In re Hector A.* (2005) 125 Cal.App.4th 783, 792-793.) We review the challenged order for an abuse of discretion. (*Ibid*; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) The parent has the burden of showing changed circumstances by a preponderance of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.)

The request for change must be viewed in the context of the dependency proceedings as a whole. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891.) As our Supreme Court explained in *Marilyn H.*: “The requirement of petitioning the court for a hearing pursuant to section 388 to show changed circumstances must be viewed in the context of the dependency proceedings as a whole. (*Cynthia D. v. Superior Court* [(1973) 5 Cal.4th 242,] 253.) Dependency proceedings are proceedings of an ongoing nature. While different hearings within the dependency process have different standards and purposes, they are part of an overall process and ongoing case. One section of the dependency law may not be considered in a vacuum. It must be construed with reference to the whole system of law of which it is a

part so that all may be harmonized and have effect. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)” (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) After modification services have been terminated, the court’s focus has shifted to the needs of the child for permanency and stability. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447; *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) When the section 388 modification petition is filed after reunification services have been terminated and the section 366.26 selection and implementation hearing has been set, the focus of the proceedings has shifted from the parent’s interest in the care, custody, and companionship of the child to the youngster’s best interests. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317; *In re Janee J.* (1999) 74 Cal.App.4th 198, 211.)

According to the mother, the reunification petition should have been granted because: Anthony, Sabrina and Faith were in a permanent plan of long term foster care; Anthony and Sabrina wanted to be released from foster care; Hope’s section 366.26 hearing was postponed for several months; the mother had started taking psychotropic medication; the social worker had noticed a change for the better in the mother’s behavior; the mother was doing well in a residential drug treatment program; the mother had appropriate visits with the children; and all the children (including Hope and L. L.) should be returned so they could grow up together. For the reasons stated below, we conclude the juvenile court did not abuse its discretion in denying the section 388 as to all the children.

Here, the mother showed that she was had been enrolled in a residential drug program since July 2007. However, she had not completed any drug treatment program. As recently as March 2007, the mother was testing positive for codeine and Vicodin. Although the mother was under the care of a psychiatrist and taking psychotropic drugs, there was no evidence that she had submitted to the court ordered Evidence Code section 730 evaluations. Thus, the record at most, showed “changing” as opposed to “changed” circumstances. Also, the juvenile court could easily conclude that the mother failed to establish it was in the children’s best interests to be returned to her. The children were

taken into custody in April 2006. The mother had a long history of drug abuse and dependency issues with not only the five children in this case but also with older youngsters, three of whom were adopted. With the exception of L. L., each of the mother's five youngest children had been dependents of the court prior to the present dependency proceeding. No doubt the juvenile court terminated jurisdiction over Sabrina, Anthony, Faith, and Hope in July 2005. But by April 2006, the mother's drug abuse and neglect of the children led to the current detention of her five youngest children. The mother's neglect included: failing to obtain medical attention for Anthony whose foot had been injured; the failure to ensure her children attended school; and maintaining a filthy and unsanitary home. The mother was subsequently convicted of willful cruelty to a child. In the current dependency proceeding, although the mother was given reunification services, she refused to comply with court orders regarding the entirety of the case plan. Indeed, the mother showed no signs of cooperating with the case plan, refused to disclose information about herself to the department, and did not maintain consistent visitation with the children.

The juvenile court terminated reunification services on April 4, 2007, a year after the children were detained. By the time the mother filed the section 388 petition in October 2007, the children had been in had been in foster care for about 18 months. Reunification services had been terminated six months earlier. L. L. had spent more than one-half her life in foster care. The older children had been in the foster care system for a great portion of their lives including the current dependency proceeding. In any event, the evidence only established "changing" as opposed to "changed" circumstances. As one appellate court has noted: "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47; accord *In re Edward H.* (1996) 43 Cal.App.4th 584, 594; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The juvenile court

reasonably could have ruled that it was not in the children's best interests to be removed from their stable environments to the uncertainty of the mother's living situation. Because there was no evidence presented in the October 2007 petition that established "changed" as opposed to "changing" circumstances or anything demonstrating the best interests of the children would be promoted by the requested modifications, the juvenile court did not abuse its discretion in denying the section 388 petition.

C. The Sibling Relationship Exception

The mother argues the juvenile court should have found the interference with sibling relationship exception applicable to the case. Former section 366.26 subdivision (c)(1)(E), as it was in effect at the time of the November 28, 2007 permanent plan hearing, applied if: "There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (Stats. 2006, ch. 838, § 52, p. 4999.)

The purpose of this exception is to preserve sibling relationships that "serve as anchors for dependent children" whose lives have been uprooted by parental misbehavior or neglect. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 404; accord *In re Valerie A.* (2002) 139 Cal.App.4th 1519, 1523.) The Court Of Appeal has explained "If termination will substantially interfere with the sibling relationship, [former] section 366.26, subdivision (c)(1)(E) lists numerous factors the juvenile court is to consider in determining whether the circumstances of any given case warrant the application of the exception. First, a juvenile court must consider the nature and extent of the relationship, including, but not limited to facts such as 1) whether the child was raised with a sibling in

the same home, 2) whether child share significant common experiences, or 3) whether the child has existing close and strong bonds with a sibling. If the relationship exhibits some or all of these factors, the juvenile court must then go on to balance any benefit, emotional or otherwise, the child would obtain from ongoing contact with the sibling against the benefit of legal permanence the child would obtain through adoption. [Citations.]” (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 403; see *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 949) The juvenile court considers the factors exclusively as they relate to the child being considered for adoption and the focus is not on the other siblings. (*In re Celine R.* (2003) 31 Cal.4th 45, 54; *In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) The mother had the burden of showing: the existence of a significant sibling relationship; termination of parental rights would interfere with that relationship; and it would be detrimental to L. L. to terminate parental rights based on the sibling relationship exception. (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 401; *In re L.Y. L.*, *supra*, 101 Cal.App.4th at p. 952.) If the mother had met that burden, the juvenile court was required to balance whether the benefit to L. L. of continuing the sibling relationship outweighed the positive effect of permanence resulting from adoption. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 254; *In re L.Y. L.*, *supra*, 101 Cal.App.4th at pp. 951-953.) The juvenile court’s finding is reviewed for substantial evidence. (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1019; *In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 953.) 1011.)

Here, the juvenile court’s ruling that the sibling relationship exception did not exist is supported by substantial evidence. L. L. was 17 months old when she was detained. By the time of the section 366.26 hearing in November 2007, L. L. had lived with her foster family for about 18 months. Thus, most of L. L.’s life had been in lived in her prospective adoptive home. There was evidence that L. L. had formed significant and close bonds with the foster parents who had taken care of her most of her life. By contrast, the record contains no evidence L. L. had any significant or close bonds with any of her biological family members including her older siblings. While L. L. may have lived with her older siblings, the common experience occurred at a time when she was

less than two years old. Although the children had sibling visitations and may have had some common maternal visits, there is no evidence that L. L. had any bond with any of the other children. There is absolutely no evidence that L. L. would suffer detriment if the relationship ended. It should also be noted in that respect that L. L. is in the same foster home as Hope whom the foster parents also want to adopt. In any event, no evidence was offered to show that L. L. would suffer detriment from terminating her sibling relationships. Although the parties stipulated that Anthony, if called to testify, would testify that he did not want L. L. to be adopted, the mother did not present any evidence that adoption was detrimental to either child. Thus, the mother has not shown that termination of her parental rights should not have occurred due to the sibling relationship exception.

IV. DISPOSITION

The orders denying the section 388 petition and terminating parental rights are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.